In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Case
TOPGALLANT LINES, INC.	)	
(Chapter 7 Case 89-41996)	)	Number 90-4028
	)	
Debtor	)	
	)	
TOPGALLANT LINES, INC.	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
MILITARY SEALIFT COMMAND	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Debtor initiated this proceeding on February 16, 1990, seeking turnover of some $1,965,841.59 in ocean freight charges and detentions from Defendant, Military Sealift Command, an agency of the United States of America. Debtor alleges that Defendant's

liability for these freight charges stems from Debtor's carriage of Defendant's cargo from the Continental United States to Western Europe. In its Answer, Defendant denied having any liability to Debtor. On April 1, 1994, after the parties completed discovery, Defendant filed a Motion for Summary Judgment. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The following facts are not in dispute.[1] On June 12, 1989, the Military Sealift Command ("MSC")[2] issued solicitation, offer and award N0003389-R-2300 First Cycle seeking worldwide ocean and intermodal transportation services for the period October 1, 1989, through March 31, 1990. In response to this solicitation, Debtor bid to provide services to the MSC, certifying that it was an ocean common carrier within the meaning of the Shipping Act of 1984, 46 U.S.C. app. 1701(6). Debtor's bid proposed to provide ocean and intermodal container services on certain trade routes between the east coast of the continental United States and the west coast of continental Europe and the

[1]In its Statement of Material Facts, Plaintiff stipulated to the facts alleged in Paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 16, 17, 18, 19, 22, and 23 of Defendant's Amended Statement of Material Facts. Plaintiff disputed or was unable to admit to the facts alleged in Paragraphs 20, 21, 25, 26, 27, 28 29, 30, 31, 32, 33, 34, 35 36, 37, 38, 39, and 40 of Defendant's Amended Statement of Material Facts. Thus, Plaintiff neither stipulated to or disputed Paragraphs 8, 11, 12, 13, 14, 15, and 24 of Defendant's Amended Statement of Material Facts. The facts contained in these seven paragraphs (¶¶ 8, 11, 12. 13, 14, 15 & 24) will therefore be taken as true for the purposes of this motion. *See* Rule 6.6 of the Local Rules for the Southern District of Georgia.

[2]The MSC is responsible for contracting with operators of commercial United States flag vessels for worldwide ocean and intermodal container and breakbulk transportation of Department of Defense ("DOD") cargo. The DOD ships millions of tons of such cargo annually in support of its military objectives, as well as to serve military and civilian personnel overseas.

United Kingdom. Debtor proposed to utilize the time-chartered vessels M/V Chesapeake Bay and M/V Delaware Bay. Debtor also submitted inland linehaul rates for numerous points in the continental United States and Europe, as well as rates for miscellaneous and accessorial charges related to container service.

On September 1, 1989, MSC and Debtor entered into contract number N0003390-C-9013 for the movement of containerized cargo. The terms of the contract, along with the rates and service accepted thereby were included in the MSC Container Agreement and Rate Guide. Under this contract, Debtor agreed to provide ocean and intermodal transportation for MSC cargo time tendered between the United States and Northern Europe and the United Kingdom. This type of service, referred to as "liner term" service, included the following:

1) Furnishing a container to the government on a chassis for stuffing;

2) Receiving and handling the stuffed container at the government or carrier facility;

3) Receiving and handling the container at the carrier's loading terminal;

4) Loading and transporting the container in the carrier's vessel;

5) Discharging and handling the container, including Customs clearance at the carrier's receiving terminal;

6) Paying all port charges incurred by the container;

7) Furnishing the container on a chassis; and

8) Delivering the container of cargo and making it available to the government consignee at the place designated in the shipping order.

In providing liner term service, Debtor assumed all responsibility and cost for the transportation of the cargo from the port or point where the cargo was receipted for by Debtor to the designation port or point where Debtor made the cargo available to the MSC.

When MSC ordered transportation services from Debtor under the contract, it issued a Shipping/Clearance Order to Debtor. MSC also prepared a cargo manifest for each vessel that listed the cargo stored in containers aboard each vessel and the origin and destination of the cargo. These documents, along with the terms and conditions contained in the Rate Guide constituted evidence of ownership of the cargo and the contract of carriage.

Section G-7(a) of the contract specifically provides that freight shall be earned upon delivery of the container to the ultimate destination set forth in the shipping order or applicable amendment. This section further provides that costs for any damage to,

or shortage of, cargo, as well as for any other charges for services or supplies furnished by the government which costs are the responsibility of the Debtor, may be withheld or offset from any sums due or freight owing a carrier under the contract. The contract also contains a default clause, which provides that any excess reprocurement costs or damages that the MSC incurs as a result of Debtor's failure to complete voyages and related transportation services undertaken prior to the filing of bankruptcy, may be offset from any sums due or freight which the MSC owes Debtor.

Pursuant to the contract, MSC booked from time to time Department of Defense cargo with Debtor for carriage between points agreed to in the contract. The final voyage of the MV CHESAPEAKE BAY under the contract was MSC-designated voyage A5523, designated by Debtor as voyage number 33, while the final voyage of the MV CHESAPEAKE BAY was MSC-designated voyage A5524, designated by Debtor as voyage number 34. The scheduled sailing itinerary for these two voyages covered trade route 05 from the United States east coast to Northern Europe and the United Kingdom. On voyage A5523, The M/V CHESAPEAKE BAY'S was scheduled to arrive at its ports of discharge between December 10, 1989 and December 20, 1989. The M/V Delaware Bay had an estimated time of arrival on Voyage A5524 at ports of discharge Rotterdam, the Netherlands, on December 22, 1989, at Bremerhaven, Germany on December 23, 1989, and at Fleixstowe, United Kingdom on December 25, 1989.

The first overseas port of call for the M/V Chesapeake Bay on voyage A5523 was Rotterdam, the Netherlands. Debtor discharged and affected delivery of certain government cargo in accordance with the contract. Accordingly, the MSC paid ocean freight charges on this cargo in the amount $279,259.00 to Debtor as part of the $708,326.00 payment made by MSC to date for these final voyages.

On December 13, 1989, however, before the vessels had completed their voyages, First American Bulk Carriers ("FABC") declared Debtor to be in default under the Subbareboat Charters by which Debtor had possession of the M/V Chesapeake Bay and M/V Delaware Bay. FABC took possession of both vessels and withdrew them from service. On the same date, December 13, 1989, but after FABC took possession of the vessels, Debtor voluntarily filed a petition for relief under Chapter 11 of the Bankruptcy Code.

When the M/V Chesapeake Bay arrived at its second port of call in Bremerhaven, Germany, it was arrested. The M/V Delaware Bay was still at sea en route to its European ports of call when Debtor filed for protection under Chapter 11 of the Bankruptcy Code. The vessel by-passed its scheduled port of call at Rotterdam and proceeded directly with MSC cargo on board to the port of Bremerhaven, Germany. At Bremerhaven the vessel was immediately arrested.

Debtor did not complete delivery of MSC's DOD cargo after the arrest of its vessels in Bremerhaven. MSC made alternate arrangements for the discharge and further carriage of its cargo. The parties dispute the circumstances under which MSC took delivery of its cargo in Bremerhaven and made alternate arrangements for its carriage to its ultimate destination in western Europe and the United Kingdom. The government contends that Debtor, unable to secure its vessels from arrest in Bremerhaven, essentially abandoned the cargo at the port, leaving the MSC no choice but to negotiate and pay for the release and further carriage of the cargo by other means. Debtor, on the other hand, contends that the MSC did not allow it an opportunity to secure the vessels and their cargo, instead demanding immediate access to its cargo. Debtor alleges that the MSC's urgency in gaining possession of the cargo was due in large part to the fact that one or more of the containers contained the personal effects of a Navy admiral.[3] As set forth more fully below, this factual issue is critical to the resolution of this proceeding, and neither party has presented evidence sufficient to resolve it on this Motion.

MSC makes three basic contentions in support of its Motion for Summary Judgment. The first is that Debtor did not, under the express terms of the contract, earn any ocean freights beyond what MSC has already paid it because Debtor failed to deliver the cargo to its ultimate destination. Second, it contends that Debtor is not entitled to freights

[3] *See* Affidavit of Thomas A. Dillon, Jr., filed by Debtor on June 22, 1994 and made a part of the record of this proceeding as Docket Entry No. 123.

pro rata itineris because Debtor abandoned the cargo after the arrest of its ships. Finally, MSC contends that, even if it remains liable to Debtor for some amount of ocean freights, it is nevertheless entitled to offset the excess costs that it incurred in procuring transportation of its cargo after Debtor's vessels were arrested in port. The government asserts that it incurred, as a direct and proximate result of Debtor's breach of the contract, additional post-petition costs to complete delivery of the cargo in the amount of $512,082.00.

Debtor apparently does not dispute that the contract requires delivery of the freight at the destinations specified in the Shipping Order as a condition precedent to its entitlement to ocean freights. Debtor does contend, however, that under the doctrine of *pro rata itineris*, it is entitled to the reasonable value of its services in carrying MSC's cargo from the United States to Bremerhaven, Germany. Debtor also contends that, under section 553 of the Bankruptcy Code, the government is not entitled to offset expenses it claims to have incurred as a result of Debtor's failure to deliver the cargo to its ultimate destination.

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Bank, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . ". United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (*quoting* Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982)).

Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forth with some evidence to show that a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court should consider "all the evidence in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

There is no question that Debtor failed to deliver MSC's cargo to its ultimate destination, and Debtor apparently does not dispute the fact that, under the contract, it was required to deliver the cargo to its ultimate destination before it earned any freights. Thus, it is clear that Debtor is not entitled to collect any further freight charges from MSC under the contract. Debtor does contend, however, that it is entitled, under the doctrine of *pro rata itineris*, to reasonable compensation for the services it provided MSC in carrying its cargo from the continental United States to the port of Bremerhaven, Germany. Therefore, the initial question is whether Defendant has carried its burden of demonstrating that, as a matter of law, Debtor is not entitled to any such compensation under the doctrine of *pro rata itineris*. For the reasons that follow, I find that Defendant has not made such a demonstration.

The contract at issue in this case reflects the general rule under American maritime law that a carrier does not earn ocean carrier freight charges unless and until the goods are delivered to their ultimate destination. *See* Alcoa S.S. Co., Inc. v. United States, 338 U.S. 421, 422 70 S.Ct. 190, 191, 94 L.Ed. 225 (1949); Owens v. Breitung, 270 F. 190 (2nd Cir. 1920); Trans-Oceanic Peace Corp. v. India Supply Mission, 325 F.Supp. 474, 476 (S.D.N.Y. 1971). In certain circumstances, however, the doctrine of *pro rata itineris* may allow a carrier, who would have otherwise forfeited its right to freight charges by failing to complete delivery, to recover a pro rata share of freights. The circumstances required for

the doctrine to apply have been set forth by the Supreme Court as follows:

> [I]f the shipper voluntarily accepts the goods at the place of the disaster, or at any intermediate port, such acceptance terminates the voyage and all responsibility of the carrier, and the master is entitled to freight *pro rata itineris*. The same rule, as it respects the effect of the voluntary acceptance of the goods at the place of the disaster, or intermediate port, applies in case the ship is disabled or prevented from forwarding them to the port of destination by a peril or accident not within the exception in the bill of lading.

Propeller Mohawk, 75 U.S. 153, 161, 19 L.Ed. 406, 8 Wall. 153 (1868). The shipper's voluntary acceptance of the goods at a point short of the ultimate destination must be clear. "It should appear from the evidence and circumstances attending the transaction that the acceptance was intended as a discharge of the vessel and owner from any further responsibility - what would be equivalent to a mutual arrangement, express or implied, by which the original contract in the bill of lading was rescinded. The ground of the exemption from responsibility of the vessel . . . is the voluntary acceptance of the goods at the intermediate port." Id. at 162.

Accordingly, if the shipper is placed in the position of either accepting the goods where the lay or abandoning them, a promise to pay freight may not be inferred from the fact that the shipper took delivery of the goods under such circumstances. Trans-

Oceanic Peace Corp. v. India Supply Mission, 325 F.Supp. at 478. Nevertheless, the carrier must be given a sufficient opportunity to remedy whatever difficulty it has encountered and deliver the cargo to its ultimate destination. "[W]hile the [ship]owner has any reasonable chance to perform, as in any other contract, he must be allowed to do so, and the risk of terminating that chance must fall upon the shipper who chooses to withdraw the cargo." Owens v. Breitung, 270 F. at 194 (Opinion of District Court, Learned Hand, J.).

Thus, Debtor's entitlement to freights *pro rata itineris* for delivering MSC's cargo to the port of Bremerhaven, Germany depends upon the circumstances surrounding MSC's acceptance of the cargo at that point. Did MSC voluntarily accept delivery of the cargo at that point or was it forced to accept delivery because Debtor had essentially abandoned the cargo? Did the parties' conduct constitute a mutual rescission of the terms of the contract? Did Debtor abandon the cargo or was it prevented by the arrest of its vessel from reaching its port of destination? Did MSC permit Debtor reasonable opportunity to perform or withdraw its cargo prematurely? As previously noted, the parties dispute these factual issues and neither party has presented sufficient evidence in connection with Defendant's Motion to resolve it. Therefore, genuine issues of material fact remain as to whether the MSC's acceptance of its cargo at the port of Bremerhaven, Germany constitutes

a basis for relief to Debtor.[4]

Because these issues of fact are critical to the ultimate resolution of whether Defendant is indebted to Debtor for ocean freights arising from the final voyages of the M/V CHESAPEAKE BAY and the M/V DELAWARE BAY, Defendant's Motion for Summary Judgment must be denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment of Defendant, Military Sealift Command, an agency of the United States Government, is hereby DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of July, 1994.

[4]This conclusion obviates the necessity of addressing other potential factual or legal bases upon which Debtor's opposition to this Motion might alternatively be grounded.